

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

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SUPERIOR COURT
CIVIL ACTION

NO. 10-03702-E

RECEIVED

CITY OF LOWELL

OCT 21 2010

vs.

OFFICE OF THE ATTORNEY GENERAL
ADMINISTRATIVE LAW DIVISION

CIVIL SERVICE COMMISSION & another¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO STAY
HEARING BEFORE CIVIL SERVICE COMMISSION**

The City of Lowell brought this action, pursuant to G. L. c. 31, § 44, G. L. c. 30A, § 14, and G. L. c. 231A, to appeal the Civil Service Commission's ("the Commission") decision to reopen an appeal by a former Lowell police officer who was terminated for just cause. The matter is before this Court on Lowell's motion to stay hearing before the Commission. For the reasons set forth below, the motion is **DENIED**, and Lowell's complaint shall be **DISMISSED**.

BACKGROUND

On June 16, 2008, Lowell notified Dararith Ung that his employment as a Lowell police officer was terminated for just cause. Among the bases for Ung's termination was that, on more than one occasion, he filed false reports that a motor vehicle had been stolen when, in fact, he knew that said vehicle had not been stolen. Further, Lowell found that Ung had lied to superior officers during the course of an investigation into those incidents.

On June 18, 2008, the Lowell Police Association ("the Union") filed an appeal of Lowell's termination decision with the Commission, pursuant to G. L. c. 31, §§ 42 & 43. On July 8, 2008, Ung voluntarily withdrew his appeal before the Commission in order to arbitrate his dispute over Lowell's just-cause determination under the collective bargaining agreement

¹ Dararith Ung

("CBA") between Lowell and the Union. The next day, the Union filed a demand for arbitration, claiming that "Pursuant to Article XX, Section 4 [of the CBA], termination of Police Officer Dararith Ung from employment with the City of Lowell [was] without just cause."

On July 17, 2008, the Commission, acting upon Ung's voluntary withdrawal, voted to dismiss his appeal. On October 30, 2008, Lowell filed an action in Middlesex Superior Court, seeking a declaration that the CBA did not require Lowell to arbitrate Ung's termination. At the same time Lowell filed a motion to stay arbitration pending the court's decision on the declaratory judgment action. On November 18, 2008, the court (Haggerty, J.) granted Lowell's motion to stay arbitration. On March 18, 2009, after hearing the parties' cross-motions for summary judgment, the court (Haggerty, J.) entered an order declaring that "[t]he matter of a police officer's termination is subject to the jurisdiction (albeit not exclusive) of the Civil Service Commission by virtue of G. L. c. 31, 41, 42" and that Ung's grievance was not arbitrable under the CBA.

On March 26, 2009, Ung filed with the Commission a motion to re-open his appeal. Meanwhile, on April 7, 2009, the Union appealed the court's March 18, 2009 decision. On August 20, 2009, the Commission denied without prejudice Ung's motion to re-open his appeal, stating that it would permit him to renew his motion upon certain conditions, one of which was a certified copy of the Appeals Court's dismissal with prejudice or affirmance of the lower court's entry of declaratory judgment in favor of Lowell. In its decision, the Commission considered and rejected Lowell's argument that the Commission lacked jurisdiction to re-open the appeal.

On February 17, 2010, Ung filed with the Commission a renewed motion to re-open his appeal. On February 22, 2010, the Appeals Court upheld the lower court's entry of declaratory judgment. On September 23, 2010, the Commission issued its "Decision on Renewed Motion to Reopen Appeal," determining that Ung would be entitled to a full hearing before the

Commission, which has since been scheduled for November 3. It again rejected Lowell's argument that it lacked authority to hear the renewed appeal, citing its August 20, 2009 decision on Ung's motion to re-open the appeal and its October 7, 2009 decision on Lowell's motion to reconsider. This appeal followed.

DISCUSSION

The Commission argues that the Superior Court lacks subject-matter jurisdiction to grant a stay of the Commission's scheduled hearing because Lowell has failed to exhaust its administrative remedies. This Court agrees, and dismisses Lowell's complaint.

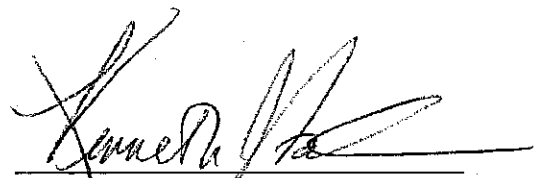
Absent adjudicatory proceedings and a final decision, judicial review pursuant to G. L. c. 30A is unavailable. *Wrentham v. Housing Appeals Comm.*, 69 Mass. App. Ct. 449, 456 (2007), *aff'd*, 451 Mass. 511 (2008), citing *Westland Hous. Corp. v. Commissioner of Ins.*, 346 Mass. 556, 557 (1963). See also G. L. c. 31, § 44 ("Any proceedings in the superior court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A."). This principle is based on the requirement that a plaintiff exhaust administrative remedies before seeking judicial relief. *Wrentham*, 69 Mass. App. Ct. at 456. The exhaustion requirement ensures that "the administrative agency in question [has] a full and fair opportunity to apply its expertise to the statutory scheme which, by law, it has the primary responsibility of enforcing." *Gill v. Board of Registration of Psychologists*, 399 Mass. 724, 727 (1987).

The exhaustion requirement applies to a claim that the administrative agency lacks jurisdiction to entertain the proceedings before it. See *Wilczewski v. Commissioner of Dep't of Env. Quality Eng'g*, 404 Mass. 787, 793 (1989); *Gill*, 399 Mass. at 727. "Only where the board fails to insist on determining the jurisdictional question, submits all material facts to the court 'leaving open only the question of law,' and the facts clearly indicate that the board lacks jurisdiction, may a party disrupt the administrative proceedings and petition the court to restrain

further action.” *Gill*, 399 Mass. at 728, quoting *St. Luke’s Hosp. v. Labor Relations Comm’n*, 320 Mass. 467, 470 (1946). Here, the Commission has insisted upon its right to determine its jurisdiction, and has ruled against Lowell on the issue.² While the Commission, in its opposition to the motion to stay, has submitted all the facts material to the jurisdictional question, the facts disclosed do not “clearly indicate that the [Commission] lacks jurisdiction” to entertain Ung’s renewed appeal, *id.*, or that “it is dealing with a matter that is clearly beyond the scope of its authority.” See *Wilczewski*, 404 Mass. at 794, quoting *St. Luke’s Hosp.*, 320 Mass. at 470. Under the circumstances, the present motion does not fall within the narrow exception to the exhaustion requirement, and Lowell’s premature appeal shall therefore be dismissed for lack of subject-matter jurisdiction.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiff’s motion to stay hearing before the Civil Service Commission be **DENIED**, and that its complaint be **DISMISSED**.


Kenneth J. Fishman
Justice of the Superior Court

DATED: October 20, 2010.

² Although this Court’s consideration of whether it has subject-matter jurisdiction over Lowell’s appeal is separate from its consideration of the legal merits of the Commission’s claimed authority to re-open Ung’s appeal, this Court notes, without deciding, that Commission’s position appears sound, particularly in light of the unique circumstances of this case. See, e.g., *Covell v. Department of Soc. Servs.*, 42 Mass. App. Ct. 427, 433 (1997) (“[A]gencies have inherent power to reopen their concluded proceedings in compelling situations as justice may require.”).